

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the matter of	)	
	)	
BONNIE D. O'CONNELL	)	File Nos. 0003171076, 0003190490
	)	
Applications For Renewal of License and For	)	
Extension of Time to Construct Educational	)	
Broadband Service Station WMY295	)	
	)	
NORTH FLORIDA MMDS PARTNERSHIP	)	File Nos. 0003171370, 0003190539
	)	
Applications For Renewal of License and For	)	
Extension of Time to Construct Educational	)	
Broadband Service Station WNTF688	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 2009

Released: June 16, 2009

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us the above-captioned late-filed applications to renew<sup>1</sup> and for extension of time to construct<sup>2</sup> Broadband Radio Service (BRS) Stations WMY295, licensed to Bonnie D. O'Connell (O'Connell), and WNTF688, licensed to North Florida MMDS Partnership (North Florida) (together, Applicants), with associated requests for waiver<sup>3</sup> of Sections 1.946(e) and 1.949(a) of the Commission's Rules<sup>4</sup> to permit untimely filing of the Extension Applications and Renewal Applications. We also have before us a petition to deny the Renewal Applications filed by Sprint Nextel Corporation (Sprint Nextel),<sup>5</sup> an opposition filed by the Applicants,<sup>6</sup> and a reply filed by Sprint Nextel.<sup>7</sup> For the reasons discussed below, we deny the Petition and grant the Waiver Requests.

<sup>1</sup> File Nos. 0003171076 (O'Connell), 0003171370 (North Florida) (filed Sep. 13, 2007) (Renewal Applications).

<sup>2</sup> File Nos. 0003190490 (O'Connell), 0003190539 (North Florida) (filed Oct. 4, 2007) (Extension Application).

<sup>3</sup> Petitions for Reinstatement and Waiver Request, File Nos. 0003171076, 0003171370 (filed Sep. 13, 2007) (Renewal Waivers); Requests for Waiver of Section 1.946(e), File Nos. 0003190490, 0003190539 (filed Oct. 4, 2007) (Extension Waivers) (collectively, Waiver Requests).

<sup>4</sup> 47 C.F.R. §§ 1.946(e), 1.949(a).

<sup>5</sup> Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Oct. 19, 2007) (Petition). Sprint Nextel's Petition to deny also references the Extension Applications. Petitions to deny do not lie against applications for extension of time to construct. See 47 U.S.C. § 309(b), (c)(2)(D). Accordingly, we dismiss the Petition to the extent it discusses the Extension Application.

<sup>6</sup> Opposition to Petition to Dismiss or Deny, Bonnie D. O'Connell and North Florida MMDS Partnership (filed Nov. 1, 2007) (Opposition).

<sup>7</sup> Reply of Sprint Nextel Corporation (filed Nov. 14, 2007) (Reply).

## II. BACKGROUND

2. The licenses for Stations WMY295 and WNTF688 expired on May 1, 2001.<sup>8</sup> The stations have never been constructed.<sup>9</sup> On March 20, 2001, Applicants attempted to file applications to renew the licenses for Stations WMY295 and WNTF688. Prior to March 25, 2002, the Multipoint Distribution Service (MDS), the predecessor-in-interest to BRS, was administered by the former Mass Media Bureau. That Bureau had a policy under which it would not accept renewal applications for MDS stations that were not constructed. On June 20, 2002, Applicants' 2001 renewal applications were returned as prematurely filed because the stations were not constructed.<sup>10</sup>

3. On March 25, 2002, the Wireless Telecommunications Bureau (WTB) became responsible for administering MDS.<sup>11</sup> WTB began requiring unconstructed MDS stations to submit renewal applications. WTB did not issue a public notice announcing this change in policy. Instead, when licensees filed requests for extension of time to construct for licenses that had expired, WTB returned the applications and asked the licensees to file renewal applications with waiver requests.

4. On March 5, 2003 and March 7, 2003, respectively, North Florida and O'Connell filed applications for extension of time to construct their stations.<sup>12</sup> Under its normal policy, WTB would return each of those applications, directing the licensees to file renewal applications. In these cases, however, the 2003 Extension Applications were actually dismissed on December 8, 2004, although the letters were phrased in such a manner as to give the Applicants 60 days to file renewal applications.<sup>13</sup> Furthermore, neither Dismissal Letter included a return address.<sup>14</sup> The Applicants have no record of receiving the Dismissal Letters, and neither Applicant sought reconsideration or Commission review of the dismissals of their Extension Applications.<sup>15</sup>

5. On September 13, 2007, Applicants filed the Renewal Applications, along with requests for waiver of Section 1.949(a) of the Commission's Rules, which requires licensees to file their renewal applications no later than the expiration date of the license.<sup>16</sup> On October 4, 2007, Applicants filed new applications for extension of time to construct, along with requests for waiver of Section 1.946(e) of the Commission's Rules, which requires that extension applications be filed prior to the construction deadline.<sup>17</sup> Applicants indicate that it would be inequitable to enforce the renewal and construction deadlines against them because they were "faced with an impossible Catch-22".<sup>18</sup> Specifically, they

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<sup>8</sup> See licenses for Stations WMY295 and WNTF688.

<sup>9</sup> Renewal Waivers at 1.

<sup>10</sup> See Letters from Michele R. Woodfork, Licensing & Technical Analysis Branch, Public Safety & Private Wireless Division, Wireless Telecommunications Bureau to Dawn G. Alexander, Esq. (Jun. 20, 2002).

<sup>11</sup> Radio Services Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, DA 02-638 (WTB Mar. 18, 2002).

<sup>12</sup> File Nos. 20030305AAC (filed Mar. 5, 2003) (North Florida), 20030307AAA (filed Mar. 7, 2003) (O'Connell) (2003 Extension Applications).

<sup>13</sup> Notices of Dismissal, Ref. Nos. 3187527 (O'Connell), 3187540 (North Florida) (Dec. 8, 2004) (Dismissal Letters).

<sup>14</sup> *Id.*

<sup>15</sup> Extension Waivers at 2.

<sup>16</sup> Renewal Applications.

<sup>17</sup> Extension Applications.

<sup>18</sup> Opposition at 3.

could not file the renewal application in 2001 because of the former Mass Media Bureau policy, and when they attempted to file their extension in 2003, it was dismissed because no renewal was on file.<sup>19</sup>

6. Sprint Nextel filed its Petition on October 19, 2007.<sup>20</sup> Sprint Nextel holds BRS Basic Trading Area (BTA) authorizations that overlap with the Geographic Service Areas (GSAs) of Stations WMY295 and WNTF688.<sup>21</sup> Sprint Nextel accuses the Applicants of “ignoring” the Dismissal Letters.<sup>22</sup> Sprint Nextel claims that Applicants showed an “extreme lack of diligence” by waiting until 2007 to refile renewal and extension applications and that they should have constructed their stations and then filed renewal applications.<sup>23</sup> Sprint Nextel also claims that granting the Renewal Applications and Extension Applications at this time would be an improper modification of its BTA licenses.<sup>24</sup> Finally, Sprint Nextel claims that granting these applications and other similar applications would create uncertainty and delay the transition of this band to providing wireless broadband services.<sup>25</sup>

7. On March 18, 2008, the Commission adopted a declaratory ruling clarifying its policy concerning the division of overlapping geographic service areas (GSAs) between active EBS licensees and EBS licensees whose licenses expired prior to January 10, 2005 but are later reinstated.<sup>26</sup> The Commission stated:

- An active BRS or EBS licensee whose former protected service area overlapped with a co-channel license that was expired on January 10, 2005 need not split the football with such expired license if the licensee has not had its license reinstated.
- If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and Order*, that licensee’s geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee’s late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances.<sup>27</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> Petition.

<sup>21</sup> *Id.* at 2. The Sprint Nextel BTA licenses in question are B026 (Augusta, GA), B271 (Macon-Warner Robins, GA), B410 (Savannah, GA), and B440 (Tampa-St. Petersburg-Clearwater, FL). *Id.*

<sup>22</sup> *Id.* at 5-6.

<sup>23</sup> *Id.* at 6-10.

<sup>24</sup> *Id.* at 10-11.

<sup>25</sup> *Id.* at 11-12.

<sup>26</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, FCC 08-83 ¶¶ 161-179 (Mar. 20, 2008) (*Declaratory Ruling*).

<sup>27</sup> *Id.* at ¶ 179.

### III. DISCUSSION

#### A. Waiver Requests and Petition to Deny

8. In determining whether to grant a late-filed application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.<sup>28</sup> We may grant a request for a waiver when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>29</sup>

9. We conclude, based on the circumstances surrounding the return and dismissals of the Applications, that a waiver is justified under the second prong of the waiver standard. Specifically, we find that failing to renew Applicants' licenses would be inequitable and contrary to the public interest. The record shows that Applicants attempted to comply with the Commission's Rules by filing renewal applications in 2001 and extension applications in 2003. Because of the former Mass Media Bureau's policy of not allowing licensees to file renewal applications on unconstructed stations and WTB's decision not to follow that policy, neither filing was accepted. Furthermore, WTB did not follow its normal policy of returning the 2003 Extension Applications and giving Applicants an opportunity to resubmit their applications. Given Applicants' repeated efforts to comply with the rules, and the confusion caused by the failure to announce the change in policy, we conclude it would be inequitable to dismiss their applications and terminate their licenses.

10. We reject Sprint Nextel's arguments that the Applicants lacked diligence. They attempted to file renewal applications and extension applications prior to the respective deadlines. While Sprint Nextel attempts to fault Applicants for failing to respond to the Dismissal Letters, the available evidence shows that the Dismissal Letters were never sent to Applicants, inconsistent with normal Commission practice. When there is an allegation that Commission correspondence was not received, "the question of receipt should be resolved on the basis of all the record evidence, including the regularity of mailing and delivery procedures and the inferences naturally drawn from those facts."<sup>30</sup> Here, the lack of an address on the letter is strong evidence that the letter was never properly mailed or received. We see no basis for faulting Applicants for failing to respond to the Dismissal Letters when those letters were never properly sent.

11. Sprint Nextel's argument that granting the late-filed Renewal Applications would be an improper modification of its BTA authorizations is baseless. Sprint does not cite any precedent to support its position. Under Sprint Nextel's logic, a late-filed BRS application could never be granted because granting a renewal *nunc pro tunc* would impinge on the right of the BTA authorization holder. The Commission clearly contemplated, however, that late-filed BRS and EBS renewal applications could be considered and granted if an appropriate showing was made.<sup>31</sup> Furthermore, the rules clearly provide that

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<sup>28</sup> See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶ 22 (1999).

<sup>29</sup> 47 C.F.R. § 1.925(b)(3).

<sup>30</sup> See Juan Galiano *et al.*, *Memorandum Opinion and Order*, 5 FCC Rcd 6442 ¶ 7 (1990).

<sup>31</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, (continued....)

the rights of the BTA authorization holder do not include co-channel incumbent licenses,<sup>32</sup> and the Commission has held that there is no bar to reinstating an application for an incumbent BRS station after the issuance of a BRS BTA license for that area.<sup>33</sup>

12. Finally, we reject Sprint Nextel's argument that granting this renewal would impede the transition of the band as unsubstantiated and contrary to the available evidence. Commission records show that the transition is proceeding well. According to our records, Sprint Nextel, Clearwire, and Polar Communications have filed transition initiation plans in 448 out of 493 Basic Trading Areas (BTAs), and the transition has been completed in 400 BTAs.<sup>34</sup> Furthermore, since these applicants have not had authority to operate, they should not have any operations that Sprint Nextel would be required to transition. We see no need to restart the transition process to accommodate those licensees who have not been operating. Because Applicants were not included in transition initiation plans, we will, on our own motion, extend the deadline for Applicants to file self-transition notifications<sup>35</sup> to thirty days after their renewal applications are granted. We expect Applicants to fully cooperate with neighboring licensees and to file the necessary applications to modify their license to move to the new band plan.

#### **B. Declaratory Ruling**

13. As noted above, the Commission has issued a declaratory ruling stating, "If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and Order*, that licensee's geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee's late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances."<sup>36</sup> The Commission directed WTB to make a determination in each case whether unique circumstances exist that would justify allowing those licensees to "split-the-football."<sup>37</sup>

14. In this case, we conclude that manifest Commission error exists and Applicants should be allowed to split the football with other licensees. Specifically, the failure to address the Dismissal Letters constitutes manifest Commission error. If the applicants had been properly notified, they could have responded and had their 2003 Extension Applications processed in a timely manner. Accordingly, we conclude that Applicants should be allowed to "split-the-football."

#### **IV. CONCLUSION AND ORDERING CLAUSES**

15. For the reasons discussed above, we conclude that Applicants have justified waivers to allow consideration of their late-filed Renewal Applications and Extension Applications. We have

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WT Docket No. 03-66, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165, 14247-14249 ¶¶ 216-220 (2004).

<sup>32</sup> See 47 C.F.R. § 27.1206(a)(2).

<sup>33</sup> See Mester's TV, *Order on Reconsideration*, 19 FCC Rcd 18507 (2004) (Commission rejects argument by BTA authorization holder that it was improper to reinstate application for incumbent license after BTA authorization was issued).

<sup>34</sup> See WT Docket No. 06-136.

<sup>35</sup> See 47 C.F.R. § 27.1236(c).

<sup>36</sup> *Declaratory Ruling*, *supra*.

<sup>37</sup> *Id.*

thoroughly considered the arguments made in Sprint Nextel's Petition and conclude that Sprint Nextel has provided no basis for denying the Waiver Requests. We therefore deny the Petition, grant the Waiver Requests, and direct processing of Applicants' Renewal Applications and Extension Applications.

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.939(h) of the Commission's Rules, 47 C.F.R. § 1.939(h), that the Petition to Dismiss or Deny filed by Sprint Nextel Corporation on October 19, 2007 IS DENIED.

17. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925, 1.949(a), and 21.11(c) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.949(a), 74.15(e), that the requests for waiver of Section 1.949(a) and/or Section 74.15(e) of the Commission's Rules contained in File Nos. 0003171076 and 0003171370 ARE GRANTED.

18. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925, 1.946(e), and 21.43(a) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946(e), 21.43(a), that the requests for waiver of Section 1.946(e) and/or Section 73.3534 of the Commission's Rules contained in File Nos. 0003190490 and 0003190539 ARE GRANTED.

19. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.949 of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), that the licensing staff of the Broadband Division SHALL PROCESS File Nos. 0003171076, 0003171370, 0003190490, and 0003190539 in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

20. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Broadband Division  
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